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IN THE

Supreme Court of the United States

OCTOBER TERM — 1970

No. 854

LUCKENBACH STEAMSHIP COMPANY, a corporation,

Petitioner,

ZIM ISRAEL NAVIGATION COMPANY, LIMITED,

and

HERMAN TELFAIR,

Respondents.

PETITION, OR IN THE ALTERNATIVE, CROSS PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION, OR IN THE ALTERNATIVE, CROSS PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

A

OPINIONS BELOW

The petitioner, or in the alternative, cross petitioner, Luckenbach Steamship Company, prays that a Writ of Certiorari issue to review the judgment and decision of the United States Court of Appeals for the Fifth Circuit entered June 19, 1970, in the case of HERMAN TELFAIR, Plaintiff-Appellant, vs. ZIM ISRAEL NAVIGATION COMPANY, LIMITED, a foreign corporation, Defendant-Third Party Plaintiff-Appellee, vs. LUCKENBACH STEAMSHIP COMPANY, a corpora-

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NOTE: All Emphasis Supplied
R: References to Record on Appeal before Fifth Circuit on appeal of Telfair
T: Transcript of trial proceedings in record below.

tion, Third Party Defendant-Appellant, Case No. 27,418, which, among other things, affirmed a final judgment in favor of Zim Israel Navigation Company, Limited, Third Party Plaintiff, against Luckenbach Steamship Company, Third Party Defendant.

Luckenbach Steamship Company, the petitioner here, was seeking reversal of the judgment which was entered by the trial court on indemnity over by Zim Israel Navigation Company, Limited, Third Party Plaintiff, against Luckenbach Steamship Company, Third Party Defendant.

Copies of the following decisions, opinions and proceedings are appended hereto:

Appendix A - Order of the United States Court of Appeals for the Fifth Circuit, dated July 22, 1970, denying Luckenbach's petition for rehearing.

Appendix B - Opinion and judgment of the Fifth Circuit, affirming the judgment, dated June 19, 1970.

Appendix C - Final Judgment of the United States District Court in and for the Middle District of Florida, dated February 26, 1969.

Appendix D - Order of the United States District Court in and for the Middle District of Florida, denying third party defendant Luckback's motion for new trial, dated April 9, 1969.

Appendix E - Findings of fact and conclusions of law and final judgment of United States District Court in and for the Middle District of Florida dated February 26, 1969.

B

GROUNDS UPON WHICH JURISDICTION OF THIS COURT IS INVOKED

The opinion and judgment of the United States Court of Appeals, Fifth Circuit, was dated June 19, 1970 and is reported at 428 F. 2d 127 (1970). (Appendix B.) The petition for rehearing was denied, July 22, 1970. (Appendix A.) Jurisdiction is invoked pursuant to 28 U.S.C., §1254(1); and 28 U.S.C. 2101(c); and Supreme Court of the United States, Revised Rules, effective July 1, 1970, Rule 19(1) (a) and (b); Rule 21; Rule 22(3).

C

QUESTIONS PRESENTED FOR REVIEW

WHETHER THE TRIAL COURT AND APPELLATE COURT ERRED:

1. IN APPLYING TO THE FACTS OF THIS CASE, INVOLVING USE BY STEVEDORE OF A FIXED ACCESS SHIP'S LADDER TO A CARGO HOLD, RULES ESTABLISHED FOR DETERMINING A STEVEDORE'S LIABILITY FOR DEFECTS IN SHIP'S EQUIPMENT BROUGHT INTO PLAY WITH RESULTANT INJURY BY THE STEVEDORE'S ACTIVE CONDUCT OR NEGLIGENCE WHILE USING SUCH EQUIPMENT UNDER HIS SUPERVISION AND CONTROL FOR PERFORMING STEVEDORING FUNCTIONS.

2. IN HOLDING THAT A STEVEDORE HAS THE DUTY TO INSPECT A FIXED SHIP'S LADDER TO A HOLD FOR DEFECTS NOT VIS-

IBLE BY A CURSORY INSPECTION FROM THE TWEEN DECK BEFORE PERMITTING USE OF SUCH A LADDER BY LONGSHOREMEN TO REACH CARGO FOR DISCHARGE WHEN THERE IS NO PRACTICABLE MEANS OF INSPECTION SHORT OF DESCENDING SUCH LADDER.

2. IN HOLDING THAT A GLOB OF GREASE ON A LOWER RUNG OF SUCH A FIXED LADDER IS A VISIBLE DEFECT, EVEN THOUGH IT CANNOT BE SEEN BY A CURSORY INSPECTION FROM THE TOP OF THE LADDER, ON THE BASIS OF ISOLATED AND INCREDULOUS EVIDENCE BY ONE WITNESS WHICH CONFLICTS WITH THE TESTIMONY OF AT LEAST FOUR OTHER WITNESS AS TO THE GREASE BEING WELL DOWN THE LADDER AND THE UNDISPUTED PHYSICAL LOCATION ON THE LADDER WHERE THE LONGSHOREMAN, TELFAIR, SLIPPED ON GREASE AND SUFFERED INJURY.

4. IN SELECTING AS A PRIME BASIS FOR FIXING LIABILITY ON THE STEVEDORE ISOLATED AND DIAMETRICALLY CONFLICTING EVIDENCE BY THE SAME WITNESS, BEAM, AS TO THE TIME HE OBSERVED THE GREASE ON THE LADDER (BEFORE OR AFTER TELFAIR'S INURY) IN RELATION TO THE DESCENT OF SUCH LADDER BY TELFAIR WHO SLIPPED ON SUCH GREASE AND SUFFERED INJURY.

5. IN HOLDING THAT THE STEVEDORE OR HIS HEADER WAS NEGLIGENT OR BREACHED THE IMPLIED WARRANTY OF WORKMANLIKE PERFORMANCE IN ANY PARTICULAR SO FAR AS A DETERMINATION OF LIABILITY IS CONCERNED AS BETWEEN THE SHIPOWNER AND THE STEVEDORE.

D

STATUTES AND CONSTITUTIONAL PROVISIONS, TREATIES, ORDINANCES, AND REGULATIONS INVOLVED

None Involved

E

STATEMENT

On December 1, 1966, Herman Telfair, a Florida citizen, filed an action at law in the Circuit Court for Hillsborough County, Florida, against Zim Israel Navigation Company Limited, an Israeli Corporation. Telfair, a longshoreman, alleged that he slipped on grease on an access ladder to the hold while working aboard the defendant's ship, The Mazal, in May, 1966, at the Luckenbach Terminal in the Port of Tampa, and sustained severe and permanent personal injuries. The complaint was framed in two counts: (1) negligence, and (2) unseaworthiness. A trial by jury was demanded.

On December 22, 1966, the defendant, Zim Israel, removed the case to the United States District Court, Middle District of Florida, on diversity grounds. Zim Israel answered and interposed, inter-alia, general denials and an affirmative defense of contributory (or comparative) negligence.

In May, 1967, Zim Israel brought a third party complaint against the stevedore company, Luckenbach Steamship Company, a non-Florida corporation, contending that if the plaintiff was injured as alleged, the stevedore was at fault and would be ultimately responsible and would be obliged to indemnify Zim Israel for any recovery against plaintiff. Lukenbach answered denying responsibility.

After extensive discovery, the case between Telfair and Zim Israel proceeded to trial before the Honorable Joseph P. Lieb and a jury on March 25, 1968. The third party action between Zim Israel and Luckenbach as to indemnity was reserved by the court for its determination without a jury. In this trial the jury returned a verdict for the plaintiff on the unseaworthiness count and in favor of Zim Israel on the negligence count, and judgment was entered accordingly in favor of the plaintiff for $133,385, plus costs.

Subsequent to this first trial, Zim Israel filed post-trial motions and under date of May 27, 1968, the court granted Zim Israel's motion for new trial on the ground that there was sufficient evidence to have permitted the jury to consider the issue of contributory negligence of the plaintiff which the judge had removed from the jury's consideration by direction at the close of all of the evidence.

A second trial was had and a jury verdict was rendered in favor of the plaintiff and judgment was entered accordingly for $50,000, plus costs. Motion for new trial was denied and the plaintiff filed an appeal on December 20, 1968, from the judgment of March 27, 1968, which was entered in the first trial.

The trial proceedings in the third party action between Zim Israel and Luckenbach were heard without a jury before the court (which also considered the evidence before the jury). On February 26, 1969, the trial court entered its findings of fact and conclusions of law and judgment thereon in favor of Zim Israel and against Luckenbach on the third party claim (A 10). Upon denial of its motion for new trial Luckenbach filed its appeal on April 30, 1969.

Zim Israel, an Israeli corporation, was owner of the vessel Mazal in May, 1966. The ship completed a cargo discharge at Miami, Florida at 2 A.M. on May 3, 1966 (T 194-196). The ship arrived at the Tampa dock approximately 10:10 A.M. May 4, 1966 (T 201). The hatches had been closed in Miami and were opened in Tampa at approximately 12:45 A.M. (T 201). Telfair was a longshoreman for Luckenbach, and "header" (foreman) of a 14 man crew of longshoremen (T 36-37).

Around 1:00 P.M., May 4, Telfair's crew was directed to the Mazal to unload cargo (wine and cherries) from No. 4 hatch. This crew "rigged" the booms and prepared to enter the hold to unload the cargo (T 47-49). They went down a ladder to the upper "tween deck," where they had to move two beams over the hatch so that the cargo could be brought out (T 53-54).

A member of the ship's crew, who was on watch particularly to guard the cargo, preceded the longshoremen and was in the hold when the first longshoreman, Beam, descended the ladder into the hold (329-334, 748-751). Thus, such sailor, whose name Chief Mate Hami could not recall (748-749), was the first man to go down the ladder on which Telfair suffered his knee injury.

It was customary to put a member of the ship's crew in the hold when wine or whiskey, or perhaps other cargo, is being unloaded. See Beam's testimony (T 329-334) and Chief Mate Hami's testimony (749-751).

Apparently, this sailor on watch descended the ladder in question without mishap and was sitting on a box when Beam went down.

Longshoreman Beam was the first to descend the ladder into the hold where the cargo was stored (T 56, 101-103). Telfair was next and got on the ladder before Beam reached the bottom (T 59-60). On his way down toward the bottom, Telfair slipped, struck his right knee and shouted for the others at hatch opening to be careful, something was wrong with the ladder and that he had hurt himself (T 56, 61). The testimony of Beam, the first longshoreman to go down the ladder gave conflicting versions as to when he first saw the grease on a lower rung and whether he had any difficulty descending the ladder. His amazing testimony on which the district court heavily relied will be examined in detail hereinafter.

TESTIMONY OF HERMAN TELFAIR

Telfair testified that longshoreman Beam, who was standing nearest the ladder by the tween deck, was first down the ladder (T 56) and that he, Telfair, got on the ladder just after Beam went down, not too close so that he would not step on Beam's hands (T 59-60). He said that longshoremen White, Hawkins and Favors, and three other longshoremen were standing at the hatch

opening ready to go down the ladder (T 101-103). Telfair said he watched Beam clear so that Telfair could get on the ladder, and that he did not see Beam slip or make a misstep (T 103). He said that when he first got on the ladder he looked down to be sure that he would not step on the hands or head of Beam, but during the rest of the descent mostly looked up (T 59-60). He also said that Beam never said anything to him or the others as Telfair was going down the ladder (T 111). He said that he slipped and struck his right knee on the side of the ladder near its bottom and yelled to the longshoreman above him that he had hurt himself, that there was grease on the ladder and for them to watch out in descending it (T 56, 61). The other longshoremen came down and none slipped or was injured (T 62). He said that he began work around 1:00 P.M. and was hurt shortly after that (T 64). He testified that there were artificial lights around the ladder up underneath it, and while they were a bit dim at the ladder, the light was adequate and that he did not ask for lights as it was daytime with some artifical light, and no lights were needed where they were going to work (T 85, 121, 149). He said that he never had lights put on in the daytime just to go down a ladder (T162-163).

There was no testimony that the area around the ladder was dark (T 658-659). Favors said the sun was shining and that he could see clearly (T 46).

TESTIMONY OF ROBERT EARL BEAM

It is obvious from the trial court's Findings Nos. 5 and 6, and Conclusion of Law No. 2 (A 12, 15) that in imposing liability on Uuckenbach, as Stevedore, great weight was placed on Beam's testimony as to what happened when he went down the ladder, as to when he first saw the grease and on the fact that Beam did not shout a warning to Telfair and the others above him.

The evidence shows that Telfair got on the ladder immediately after Beam began his descent of the ladder. (T 105, 249-250). There could be only a few seconds between their progress down the ladder. Beam's testimony re his descent is most important and should be examined closely.

The record shows that Beam changed his sworn testimony at least twice at the trial on October 16-18, 1968, from that given in his deposition on March 31, 1967. His testimony on deposition was about 10 months after the accident, whereas this trial testimony was 29 months after the accident.

On deposition Beam testified:

Q And you were the first man down?

A Down there. That's right.

Q Okay. How did you get down to where you were?

A I went down the ladder, same ladder he went down. I didn't fall, though. He slipped on the ladder.

Q Okay. *Did you have any trouble going down the ladder?*

A *No, didn't,* because I was always a little nervous on them ladders. I always watch, take my time going down.

Q Okay. What time of day was it?

A It was, I would say, around twenty after one, because I went to work at one o'clock; had done rigged up on deck, and by that time we was down in the hold.

Q All right. Now, you were in the lower hold. How far were you from him at the time?

A Well, I was just — let me see. I'll say around five or six feet, something like that, because when I got off the ladder I just walked out from under it, see.

Q And you —

A He came down next.

Q Which way were you facing?

A Well, I was facing the ladder.

Q Okay. Was there anything between you and him?

A No, nothing (Beam, deposition, 3/31/67, P. 5-6).

. . . .

Q And did Telfair say anything right at that time?

A No. He said some kind of little cuss word when he hit whatever he hit, you know.

Q Tell me how he slipped there; what you saw happen.

A Well, see, just before you get to the bottom of the ladder — I don't know how high it may be, but the crew had been working down there, or

something — but there was grease on the ladder, *and his foot slipped, and he hit his knee*, on the — you know what I mean — on the ladder *just before he got to the bottom rung*. He bumped his leg, said some kind of little cuss word, but, actually, I didn't think he was hurt, you know.

Q *How did you know there was grease on the ladder?*

A *Because you could see it.* It was some of that cable grease. I don't know how they managed it, whether they had been working on the ladder, or what the ship had been doing, but, you know, it was thick grease like they oil them cables with.

Q *When did you see the grease?*

A *After he slipped, because when I went down I didn't even pay it any attention. I didn't slip.*

Q *You didn't slip?*

A *No.* But after he slipped, then he hollered back up and told the rest of the guys to be careful coming down, see.

Q *Have you ever told him that you did slip?*

A *No. I didn't.*

Q Yes.

A *See, I didn't slip.*

Q And you didn't tell him that you slipped?

A *No. No, I didn't, because I really wasn't expecting him to slip* (Beam, Deposition, 3/31/67, Pg. 6-8).

. . . .

Q *Did you [illegible] the grease on the ladder right after Telfair fell?*

A *That's right, because I went over there and looked at the ladder after he slipped.*

Q Did you actually feel the grease?

A Yes. It was thick (Beam, Deposition, 3/31/67, P. 17).

Q Tell me about that grease a little more, if you will. What color was it?

A Well, *it was brown looking grease.* I figured it was something off a cable. It was thick; thick grease on one of the rungs of the lader.

Q And, by "cable" that would be like the runner?

A That's right.

Q *How much of it was there?*

A *Well, it wasn't but just only about one or two of the rungs. I mean it wasn't piled. It wasn't thick, you know, but it was grease on there;* could have got on there from maybe somebody—a sailor—climbed up and down the ladder and been walking on deck. I don't know how it got on the ladder, but it was on the ladder.

Q One or two rungs?

A That's right (Beam, Deposition 3/31/67, P. 19-20).

From this testimony it is obvious that Beam had no cause to warn Telfair who was well on the way down the ladder when Beam reached the cargo floor.

At trial before the jury, however, Beam changed his testimony by testifying as follows:

Q After you got on the ladder and started down, tell us what happened?

A I started down, and just before I got down to the level *I slipped a little bit.*

Q Just before you got to the level you slipped a little bit?

A Yes sir.

Q Did you see what it was you slipped on?

A Yes, I saw what it was.

Q What was it?

A It was grease.

Q What kind of grease was it? Can you describe it?

A It was a thick dark brown grease (T 312).

. . . .

Q And did you see Herman slip?

A Yes, sir.

A After he slipped, did he fall or stay on the ladder?

A He slipped and fell.

Q Did you see any grease on Herman after the accident?

A No more than on the leg of his pants knee.

Q On his pants knee?

A Yes, sir.

Q Now, after Herman slipped, *did you say anything to anybody else about the grease on the ladder,* to watch out or anything like that?

A *Yes, I hollered back up, but I don't know who was next on the ladder. I hollered back "for you all to be careful on the ladder, because there was grease on the ladder."* (T 313).

Q Now, did you look at this grease on the ladder before —

A No, sir. You say did I look at it before?

Q Wait for my question, please. *Did you look at the grease on the ladder before Telfair fell?*

A *No sir, I didn't pay any attention to it.*

Q Did you see grease on the ladder before Telfair fell?

A I saw it on my feet, yes, sir.

Q *Did you see grease on the ladder before Telfair fell?*

A *Yes, I did. I saw the grease on the ladder.*

Q *Before he fell you saw grease on the ladder?*

A *Yes, sir.*

Q Did you holler up to him, "to watch out, there is grease on the ladder"?

A No, sir, I didn't (T 319n).

. . . .

A *I didn't have any trouble. I went down the ladder, as I just said. I didn't have any trouble about going down the ladder.*

Q You mean that slipping that you did —

A That is the only thing. *It wasn't no trouble to me. I mean that happens to me a lot of times working, yes sir. That wasn't no trouble* (T 323).

He again reversed his field when questioned on behalf of Luckenbach before the Court (with the jury excluded), and returned to the testimony he gave on deposition. He testified:

Q Has your testimony changed any in this trial?

A Has it changed?

Q What?

A No, sir. The only thing, I just probably misunderstood the question.

Q When did you see that grease? Didn't you swear here that you saw it after he slipped?

A I saw the grease — I didn't fall, I slipped. What I mean is I didn't fall off the ladder. I thought when he said "slip", I was under the impression he mean did I fall off the ladder?

Q *When did you see the grease?*

A *Oh, I saw the grease after he slipped down.*

Q *After what?*
A *After Monkey slipped.*

Q *After who slipped?*

A *Telfair slipped.*

Q You didn't see the grease before Telfair slipped; is that it?

A I saw it when my foot slipped on the rung of the ladder, and some grease was on my shoe, the bottom of my shoe, *And then I paid particular attention after Telfair slipped.*

Q Now, you didn't know there was any grease on your shoe until after you say Telfair slipped; is that your testimony?

A He slipped, yes.

Q What?

A *Yes, sir, After Telfair slipped, then I paid attention.*

Q So you had no call to holler up and warn them; is that right?

A Well, I slipped a little bit on the ladder, myself. I didn't fall off the ladder, my foot slipped. One of my feet slippedb on the rung of the ladder. One of my feet, just one of them.

Q *But the first time you saw the grease was after Telfair slipped; is that it?*

A *Yes, sir. Right then I specially paid strict attention to the ladder, after he slipped.*

Q So you didn't know what made you slip; is that right?

A Well, after I saw it on my shoe, on the bottom of my shoe, the grease was. (T 335, 337)

In view of the ease with which Beam changed his sworn testimony at least twice, the simple question arises as to what credibility can be given his supposed discovery of grease before Telfair slipped and injured his knee. Obviously it forms the keystone of liability against Luckenbach as found by the trial court. His desposition testimony in March 31, 1967, was much nearer in time to the accident of May 4, 1966, and more apt to be true than his trial testimony 29 months after the accident. He also testified at trial that he shouted a warning and shortly thereafter said he did not do so (See above testimony).

Furthermore, as has been pointed out above, in descending this vertical ladder it would be virtually impossible for Beam to see this grease until he reached the floor and looked up at the ladder. By this time Telfair was well down the ladder to the point of injury.

DUTY TO INSPECT LADDER

The district court Finding No. 7 (A 13) says that Telfair should have inspected the ladder before permitting anyone or himself to use it.

The applicable law is contrary to this Finding as will be shown hereinafter by case law. However, we are concerned here with the facts and practicalities of the situation.

For Telfair to have inspected the fixed ladder would have required, for all practical purposes, that he do just what he did when he was injured, namely, go down the ladder. There was no custom nor practice for this to be done at Tampa, nor any rule or regulation requiring this (T3 29). Lucas, Dock Foreman, and Cowles, Luckenbach Superintendent, said Telfair should not have gone down the ladder ahead of time to inspect it (T3 23).

Unless the ladder was visibly and patently defective from looking at it from the tween deck, it would be reasonable and logical to assume it was not defective because of grease on the left side of one lower rung or for other causes. Telfair said he was not supposed to go first down a ladder or to go down and inspect it (T 155-156). Three witnesses said they looked down and could see no grease and that Telfair slipped near the bottom of the ladder (White T 229, 237, 265; Hawkins T. 620; Beam T 314, 318-319; Telfair T 61). Moreover, the assumption

that the ladder was safe and not defective would appear to be most reasonable, since one of the ship's crew, assigned to guard the cargo, had preceded Beam down the ladder into the No. 4 hold and was sitting on a box (A 329-334). xcept by use of this ladder, there was no other apparent way for him to have assumed this position in the hold (A 329-334).

In Conclusion of Law No. 5 (A 16) the district court found that Luckenbach breached Sec. 9.25 of the Safety and Health Regulations for Longshoremen by not prohibiting use of the ladder when it was visibly unsafe. This regulation, now Sec. 1504.25(b) of such regulations as published by U.S. Department of Labor, merely provides:

> "When any fixed ladder is *visibly unsafe* the employer shall prohibit its use by employees."

Of course, the key words here are "visibly unsafe." As has been shown, the ladder used by Telfair was not "visibly unsafe," the overwhelming testimony being that one could not see the grease on the rung from the tween deck where the longshoremen were watching Telfair descend the ladder. The grease was visible only after one descended the ladder and examined the rung near the bottom of the ladder to which the grease adhered. Only one witness, Favors, whose evidence will be closely examined, said that grease was on the very top rung and visible. This was contrary to the testimony of Beam, Telfair, White, Hawkins and to their testimony as to where Telfair slipped well down the ladder.

Favors' testimony is incredible and indicates that Beam, Telfair and the others would deliberately grab the greased top rungs of a ladder to descend it. This strains

all credulity but was the only evidence as to visibility referred to by the court in Finding No. 11 (A 14).

F

REASONS FOR ALLOWING THE WRIT

Luckenbach contends that the district court and the appellate court committed basic legal error in selecing rules and principles of the law which have no proper application to this case. The cases and authorities cited by the district court in its conclusions of law, clearly show that it was selecting cases and rules which apply when the stevedore takes over the supervision and control of equipment of the ship, or when the stevedore by active and negligent conduct brings into play a defect constituting unseaworthiness of a ship or its equipment. The rules applying to these cases as to the stevedore's liability, are bottomed on the fact that acual functional use is being made of part of the ship's equipment or the stevedore by active and negligent conduct brings into play a defect amounting to unseaworthiness.

The very cases cited by the district court in support of these conclusions of law, if closely examined, reveal that they are not applicable to the instant case. The court in its support, cites *Southern Stevedoring and Contracting Company vs. Hellenic Lines, Ltd.*, 388 Fed. 2d 267, 270-271 (5th Cir. 1968); *United States Lines Co., v. Williams*, 365 F.2d 332 (5th Cir. 1966); *Italia Societa vs. Oregon Stevedoring Company*, 376 U.S. 315 (1964); *Crumady v. Joachim Hendrik Fisser*, 350 U.S. 423, 428-429 (1959) (A). The rules of these cases are not ap-

plicable to the instant case. The district court entertained a fundamental misconception of law in attempting to apply such rules to the facts in the case at hand.

The Petitioner believes that the decision and judgment here are in conflict in the line of cases that should control the instant case. These cases are *Cia Maritma Del Nervion v. James J. Flanagan Shipping Corporation, Stevedore Division* 308 F. 2d 120 5 Cir. (1962) (perhaps the leading case of that Court dealing with a fixed ladder going into the hold of a ship); *Ignastyuk v. Tramp Chartering Corp.*, 250 F. 2d 198, 201 (2 Cir. 1957); *Calderola v. Cunard Steamship Company*, 270 F. 2d 475 (2nd Cir. 1960), cert. den. 364 U.S. 884, 81 S. Ct. 172; involving grease on a ship's ladder, and *Smith v. Jugoslvenska Linisjska Plovidba*, 278 F. 2d 176 (4 Cir. 1960), where stevedore's liability was predicated on actual knowledge by its safety man that the ladder causing the injury was not secured by bolts, thus having actual notice of the defect; *Santomarco v. United States*, 277 F. 2d 255 (2 Cir. 1960), involving a longshoreman slipping on oil which was clearly obvious on the dock and ignored by the longshoreman and stevedore; and by *Ray v. Compania Naviera Continental, S.A.*, 203 F. Supp. 206 (D. Md. 1962).

The U.S. Ct. Appeals for the 5th Circuit, in *Flanagan, supra,* closely examined and definitely established the criteria that should apply to the injury of a longshoreman on a defective ladder going into the hold of a ship. There the injured longshoreman going down the ladder into No. 2 hold, lost his footing at a point where "one rung of the ladder was missing and the rung below it was bent downward." (A much greater and more obvious defect than a small glob of grease on one rung of the ladder, as in this case).

It appears that no inspection, cursory or otherwise, had been made of the ladder. The Court stated that it was not clear that "merely looking down into the ladder into the hold would have revealed the defect in the ladder." 308 Fed. 2d 122 (Certainly there is testimony in the instant case that no one could see the grease by a look down the ladder to the third or fourth rung from the bottom of the ladder where the grease was located.)

The Court further stated "it was not customary, in Gulf Coast ports, for longshoremen to refrain from beginning work until a representative from the stevedore company checked the holds." 308 F. 2d 122. The testimony showed that shipowners would not countenance delays caused by such inspections. (The testimony in the instant case shows it was not customary in Tampa, a Gulf port, to inspect ladders or holds before unloading (T3 27).

The Court called attention to the fact that indemnity is created, however, when unseaworthy equipment is present and the stevedore by active conduct and negligence brings such defective equipment into play with a resultant injury. (Citing *Crumady,* supra). It further stated that "neither prior cases nor practicality requires a stevedore to make a thorough inspection of a ship for any 'visual defects' before work by his crew commences." 308 Fed. 2d 124.

The Court said that uniformly the stevedore had been held liable for a defect in the ship's ladder, or other similar equipment, only when the stevedore had actual notice of the hazardous situation and failed to take any steps to remedy it. 308 Fed. 2d 124. For same holding see *Ignatyuk,* 250 F 2d 201.

The Court agreed that where the stevedore had actual notice of a dangerous working condistion by reaon of an obvious defect readily observable, liability will be imposed, and cited for such proposition the *Santamarco* and *Smith* decisions, *supra,* in both of which the defect was obvious and actual notice was had by the stevedore.

The Court stated, however, that "where there has been no notice of a damaged or faulty ladder, the courts have not implied a hypothetical duty to inspect, and the stevedore has not been required to indemnify the owner." 308 F. 2d 124. It cited the *Calderola* case, *supra,* where the injury occurred when an employee slipped on grease on a ship's ladder. Even though the employee had put his hand in the grease going up a ladder, it was held that since the grease had been there only a short time before the accident, it would not be reasonable to require the stevedore to have discovered the grease in the course of normal routine. (In the instant case Telfair was split seconds, not minutes, behind Beam on the ladder, even if it be assumed Beam slipped on the grease.)

The Court then stated that a cursory glance down a ladder into a hold would not necessarily have revealed the missing and bent rungs, even if the cases cited by shipowners were given their most favorable interpretation. It said that no more than a cursory look is required. (Certainly, there is evidence in the instant case that a cursory glance would not reveal the small glob of grease on the left side of the rung well down towards the bottom of the ladder.)

The Court stated that there was a good reason for this doctrine in not requiring inspection, because a ship in port must get away as quickly as possible and without expense, delays, etc.

The U.S. Court of Appeals for the 5th Circuit, as late as 1966 reaffirmed the holding of the *Flanagan* decision, *supra*, in *D/S Ove Skou v. Hebert, et al*, 365 F. 2d 341 (1966). It stated on page 349 that *Flanagan* states what the law does not require as a matter of law of a stevedore regarding inspection, and then quotes on the same page, Note 14:

> "Courts allowing indemnity against the stevedore when a longshoreman has been injured through a defect in the ship's ladder or other similar equipment have done so, uniformly, only where the stevedore had actual notice of the hazardous situation and failed to take any steps to remedy it." CIA Maritima Del Nervion v. James J. Flanagan Ship Corp., 5th Cir. 1962, 308 F. 2d 120, 124.
>
> "Nor can we say, as a matter of law, that failure to make a prior inspection is a breach of the standard of performance which a stevedore impliedly warrants to the shipowner." (308 F. 2d at 125.

Continuing, the Court states:

> "The Second Circuit has phrased it:
>
> 'We hold that an implied warranty of workmanlike performance by a stevedore does not place upon him a duty to discover defects in the apparatus or equipment furnished by the vessels being loaded or unloaded which are not obvious upon a cursory inspection.' Ignatyuk v. Transp.
>
> Chartering Corp., 2 Cir., 1957, 250 F. 2d 198, 201. T. Smith & Son, Inc. v. Skibs A/S Hassel, 5 Cir., 1966, 362 F. 2d 745 (Hybe 23, 1966); Moore-McCormack Lines, Inc. v. Maryland Ship Ceiling Co., 4 Cir., 1962, 311 F. 2d 663; Orlando v. Prudential S.S. Corporation, 2 Cir., 1963, 313 F. 2d 822; Calderola v. Cunard S.S. Co., 2 Cir., 1960, 279 F. 2d 475; Ray v. Compania Naviera Continental, S.A., D.Md., 1962,

203 F. Supp. 206; Pena v. A/S Dovrefjell, S.D. N.Y., 1959, 176 F. Supp. 677; Parker v. United States, D. Ore., 1963, 223 F. Supp. 647."

It is evident that there was no actual notice to Telfair of grease before his slip and injury on the ladder. As shown hereinbefore, the grease could only be seen after one reached the cargo floor, at least until it was rubbed off by shoes and clothing of the longshoremen descending the ladder. It could not be seen from the tween deck above. The defect, therefore, from a cursory inspection was latent, not patent or "visible."

Under Section 9.25 of the Safety and Health Regulations for longshoremen (1960), now Section 1504.25 (1969), if Telfair had gone down the ladder to inspect it he would have been subjected to the same risk of injury as when he actually went down to begin work and suffered injury. There is no basis to find a "visible" defect, unless one accepts the amazing and incredible testimony of Favors regarding grease on the very top rung, which is contrary to all others testifying and wholly inconsistent as to the location on the ladder where Telfair slipped and was injured.

It should also be pointed out that while the Court in the *D/S Ove Skou* opinion, *supra,* approved the Safety Regulations, it was making a particular application of Section 1504.31 which deals comprehensively with the handling of hatch covers. This section rather rigidly regulates the handling of hatch covers because of their critical relation to safety. We have no argument with the recognition of these Safety Regulations, it being solely our contention that the defect on the ladder

(grease) in the instant case was not visible, and, therefore, the court erred in applying Section 9.25 of such Regulations.

In the *Ray* decision, *supra*, erroneously cited by the district court to sustain its position, a longshoreman was injured by the breaking of a rung of a hatch ladder. Although the rung was cracked which could have been observed if closely viewed under appropriate circumstances, the court held that "there was no type of inspection reasonable and practicable under the circumstances." (203 F. Supp. 211.) The *Ray* decision is in line with the *Flanagan* decision of this Court and the facts of these two cases are quite similar to the instant case involving the injury to Telfair.

The teachings of the Ray case are plain. An absolute standard of care and safety cannot be placed on the stevedore without creating an unduly heavy burden on the shipping industry as a whole. Shipowners want their ships unloaded in a minimum amount of time. Their successful financial operations depend upon such a speedy unloading of cargo. If the holding of the appellate court herein is permitted to stand, stevedores will have to demand detailed and close examinations of all parts of the vessel to which their crews will have access. To be safe, the stevedore would have to detail one or more of the longshoremen to make a thorough inspection of the ship's facilities, including fixed ladders into the hold, before beginning any unloading or loading operations that require use of a ladder as an access instrumentality. This would impose a heavy burden and an unjustified one. Such a holding does not represent the law applicable to the facts of the instant case.

G

CONCLUSION

The application of relevant and controlling law to the undisputed facts and credible evidence as reviewed herein, clearly indicates that the district court and appealete court selected rules which do not apply to the facts of this case. The very cases cited for support relate to situations in which the stevedore had within its supervision and control defective or inadequate equipment whose obvious inadequacies it failed to discover, or to situations in which the active conduct and negligence of the stevedore brought into play the faults or defects which produced injury.

It is submitted that the district court and appellate court erred in imposing liability and indemnity on Luckenbach and the judgment against Luckenbach should be reversed and it be discharged without liability, together with reimbursement of costs incurred in defending the third party action.

Respectfully Submitted,

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AND

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Attorneys for Petitioner

By James O. Davis, Jr.

JAMES O. DAVIS, JR.

H

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that three true copies of the foregoing petition for a writ of certiorari has been mailed to MacFarlane, Ferguson, Allison and Kelly, 512 North Florida Avenue, Tampa, Florida, and Fowler, White, Collins, Gillen, Humkey and Trenam, P. O. Box 1438, Tampa, Florida, attorneys for Zim Israel Navigation Company; Wagner, Cunningham and Vaughan, 412 Pierce Street, Tampa, Florida, Walter H. Beckham, Jr. and Padhurst and Orsick, 2nd Floor, Concord Building, 66 West Flagler Street, Miami, Florida, Attorneys for Herman Telfair, this 14th day of October _____, 1970.

By James O. Davis, Jr.
JAMES O. DAVIS, JR.

APPENDIX "A"

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 27418

HERMAN TELFAIR,

Plaintiff-Appellant,

versus

ZIM ISRAEL NAVIGATION COMPANY, LIMITED,
Defendant-Third-Party Plaintiff-Appellee,

versus

LUCKENBACH STEAMSHIP COMPANY,

Third-Party Defendant-Appellee.

Appeals from the United States District Court for the Middle District of Florida

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(July 22, 1970)

ON PETITIONS FOR REHEARING
Before WISDOM, GEWIN, and AINSWORTH
Circuit Judges

PER CURIAM:

IT IS ORDERED that the petitions for rehearing filed in the above entitled and numbered cause be and the same are hereby Denied.

APPENDIX "B"

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 27418

HERMAN TELFAIR,

Plaintiff-Appellant,

versus

ZIM ISRAEL NAVAGATION COMPANY, LIMITED,

Defendant-Third-Party Plaintiff-Appellee,

versus

LUCKENBACH STEAMSHIP COMPANY,

Third-Party Defendant-Appellee.

Appeals from the United States District Court for the Middle District of Florida

---

(June 19, 1970)

Before WISDOM, GEWIN, and AINSWORTH
Circuit Judges

WISDOM, Circuit Judge: *Seas Shipping Company v. Sieracki*, 1946, 328 U.S. 85, 66 S.Ct. 872, 90 L.Ed. 1099, extended the warranty of seaworthiness to longshoremen. *Ryan Stevedoring Company v. Pan Atlantic S.S. Corporation*, 1956, 350 U.S. 124, 76 S.Ct. 232, 100 L.Ed. 133, shifetd the liability to the stevedore when it breaches the warranty of workmanlike service. In this longshoreman (Telfair) — shipowner (Zim Israel) — stevedore (Luckenbach) case, Telfair complains of the court's granting a new trial which resulted in a much lower verdict than the verdict in his first trial. We re-

view, first, the district court's decision to grant a new trial because it had originally withheld from the jury the shipowner's defense of contributory negligence and, second, its conclusion that the stevedore breached its warranty of workmanlike service. We affirm the district court's judgment.

I

On May 4, 1966, Herman Telfair, "header" (foreman) of a longshoreman gang, slipped on a ladder while descending into the hold of the Mazal, a ship owned by Zim Israel Navagation Company, Limited. The injury required first a cartilege removal and then, because of arthritis coupled with the torn meniscus and operation, a knee joint fusion or arthodesis, permanently disabling Telfair from work as a longshoreman. The screws in his knee and joint-stiffening produced chronic back problems which eventually will cause disc problems.

In December 1966, Telfair sued Zim Israel in a Florida state court for negligence and unseaworthiness, alleging that he had slipped on grease on an access ladder. Zim Israel removed the case to federal district court and filed a third party complaint against the stevedore company, Luckenbach Steamship, for indemnity. Both Zim Israel and Luckenbach argued that Telfair had been contributorily negligent.

At the close of all the evidence, the district court granted Telfair's motion for a directed verdict on the issue of contributory negligence. The jury found that Zim Israel was not negligent, but awarded Telfair $133,385 for the Mazal's unseaworthiness. The district court entered judgment March 27, 1968. Two months later, the court granted Zim Israel's motion for a new trial (timely filed), finding "that there was sufficient evidence to have permitted the jury to consider the issue of the contributory negligence of the plaintiff".

At the second trial, the jury awarded Telfair $50,000. The district court denied Telfair's motion for a new

trial. The court also entered judgment in favor of Zim Israel and against Luckenbach on the third-party claim. Telfair and Luckenbach appealed.

II

> The precedent is longstanding in this Court that A motion for new trial is addressed to the trial judge's discretion. He may grant a new trial if he thinks he has committed an error; . . . The exercise of his discretion is not ordinarily reviewable on appeal, though a failure to exercise discretion, or an abuse of it, may be corrected.

Marsh v. Illinois Central Railroad Compnay, 5 Cir. 1949, 175 F.2d 498, 500; see *Stewart v. Texas & Pacific Railway Company,* 5 Cir. 1960, 278 F.2d 676, 678. Indeed, "[i]n few, if any, situations is the discretion of a trial judge broader than in granting a new trial". *Willitt v. Purvis,* 5 Cir. 1960, 276 F.2d 129, 132. Here the district court initially removed the issue of contributory negligence from the jury, believing there was no evidence on which to submit it. Prompted by Zim Israel's motion, however, the district court upon further consideration concluded that he should have allowed that issue to go to the jury. Consequently, he granted the motion for a new trial.

In diversity cases, the question whether sufficient evidence is presented to send a case to the jury is controlled by federal standards in this Circuit. *Boeing Company v. Shipman,* 5 Cir. 1969, 411 F.2d 365, 368-70. *Boeing* directs that a "mere scintilla of evidence" will not prevent a directed verdict, but "if there is substantial evidence opposed to the motions", "in the light and with all reasonable inferences most favorable to the party opposed to the motion", then the issue should properly be submitted to the jury. Here, Beam, the first longshoreman to descend the ladder "slipped a little bit" but did not fall. Telfair, had he been watching, could have seen him slip as did one of the other long-

shoremen. Telfair was not watching, however, because he climbed onto the ladder while the first longshoreman was still descending. The seven men who followed Telfair also descended without incident. Testimony shows that Telfair warned them of his accident. But several other individuals used the ladder that afternoon without warning. Although the ladder had not been cleaned, they suffered no mishap. We do not say that contributory negligence was a strong defense. We decide only whether the district court abused its discretion in granting a new trial because it had granted a directed verdict on contributory negligence. We conclude that there was no abuse of discretion.

III

The district court deferred decision on the indemnity claim until the conclusion of the second trial. The court then held that Luckenbach had breached its warranty of workmanlike service and thus prompted the Mazal's unseaworthiness. Among other things, the district court specifically found that the first longshoreman to descend the ladder slipped but did not fall, noticed grease on his shoe and on the ladder, yet wrongfully failed to warn Telfair. Luckenbach, in its brief, "agrees that if Beam, the first longshoreman to descend the ladder, actually saw grease on the ladder and had sufficient time to warn Telfair, who was immediately behind him, but failed to do so, there would be an adequate basis under applicable law to hold the stevedore liable for indemnity to the shipowner." But Luckenbach attempts to persuade us to reject the district court's credibility determinations in this "shifting, conflicting, and obviously unreliable testimony". *Id.*

There is no doubt that Beam's story varied from deposition to first trial to second trial. But we are unable to say that the district court accepted the wrong version. And Beam's inability to keep the story straight need not require the conclusion that all versions were

erroneous. In short, regardless of our views of the evidence, "[w]e do not retry the case. We may determine only whether the findings pass muster under the clearly erroneous concept of F.R. Civ. P.52(a), 28 U.S.C.A." *Smith v. United States*, 5 Cir. 1961, 287 F.2d 299, 301.

> It is well settled that in order for a reviewing court to set aside findings of fact by a trial court sitting without a jury, it must be clearly demonstrated that such findings are without adequate evidentiary support in the record, or were induced by an erroneous view of the law, and the burden of showing that the findings are clearly erroneous is on the one attacking them.

Chaney v. City of Galveston, 5 Cir. 1966, 368 F.2d 774, 776. Although Luckenbach has perhaps come closer than most, it has not met that burden.

We AFFIRM the judgment of the district court.

APPENDIX "C"

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

No. 66-465-Civ. T.

HERMAN TELFAIR

Plaintiff,

vs.

ZIM ISRAEL NAVAGATION COMPANY, LIMITED,
a foreign corpooration,

Defendant and Third Party Plaintiff

vs.

LUCKENBACH STEAMSHIP COMANY,
a corporation,

Third Party Defendant.

FINAL JUDGMENT

AND NOW, this 26th day of February, 1969, in accordance with the Court's Findings of Fact and Conclusions of Law, it is

ORDERED and ADJUDGED, that the Third Party Plaintiff, Zim Israel Navigation Company, Ltd., recover of the Third Party Defendant, Luckenbach Steamship Company, indemnity in the amount recovered by the plaintiff, Herman Telfair, from the defendant and third party plaintiff, Zim Israel Navigation Company, Ltd., and the reasonable attorneys' fees and costs of defense of Telfair's action by Zim Israel Navigation Company, with the legal rate of interest as provided by law, and its costs of action.

If the third party plaintiff and the third party defendant cannot agree upon the attorney's fees and defense costs which the third party plaintiff is entitled to recover from the third party defendant by way of indemnity, the Court will make further findings of fact and a supplemental judgment upon motion by either party.

DONE and ORDERED at Tampa, Florida, this 26th day of February, 1969.

JOSEPH P. LIEB
United States District Judge

APPENDIX "D"

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

No. 66-465-Civ. T.

HERMAN TELFAIR

Plaintiff,

vs.

ZIM ISRAEL NAVAGATION COMPANY, LIMITED,
a foreign corpooration,

Defendant and Third Party Plaintiff

vs.

LUCKENBACH STEAMSHIP COMANY,
a corporation,

Third Party Defendant.

O R D E R

THIS CAUSE came on for consideration upon the filing by the Third party Defendant of a Motion to Amend the Court's Findings of Fact and Conclusions of Law, to Have Judgment Set Aside and Entered for Third Party Defendant, Luckenbach Steamship Company, Inc., in Accordance With Third Party Defendant's Motion for a Directed erdict or, in the Alternative, Motion for a New Trial. The Defendant and Third Party Plaintiff also filed a Motion for Order Fixing Shipowner's Attorneys' Fee For Defense of Telfair's Claim.

The Court has heard the argument of counsel, studied the memoranda filed by the parties in support of their respective positions, examined the memoranda and time sheets submitted by the Defendant and Third Party Plaintiff in support of its motion, and is otherwise fully advised in the premises. It is therefore, upon consideration,

ORDERED, ADJUDGED and DECREED:

1. That the Third Party Defendant's Motion to Amend the Court's Findings of Fact and Conclusions of Law, to Have Judgment Set Aside and Entered for Third Party Defendant, Luckenbach Steamship Company, Inc., in Accordance With Third Party Defendant's Motion for a Directed Verdict or, in the Alternative, Motion for New Trial be, and it is hereby DENIED.

2. That the Defendant and Third Party Plaintiff's Motion for Order Fixing Shipowner's Attorneys' Fee for Defense of Telfair's Claim be, and it is hereby, GRANTED.

3. That the shipowner's attorney for the defense of Telfair's claim be, and it is hereby, fixed in the sum of Twenty Thousand ($20,000.00) Dollars.

DONE and ORDERED at Tampa, Florida, this 9th day of April, 1969.

JOSEPH P. LIEB
United States District Judge

APPENDIX "E"

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION
No. 66-465-Civ. T.

HERMAN TELFAIR
Plaintiff,
vs.
ZIM ISRAEL NAVAGATION COMPANY, LIMITED,
a foreign corpooration,
Defendant and Third Party Plaintiff
vs.
LUCKENBACH STEAMSHIP COMANY,
a corporation,
Third Party Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This case arises out of an injury sustained by longshoreman Herman Telfair upon the Motor Vessel MAZAL, in Tampa, Florida, on May 4, 1966. Telfair was employed by the third party defendant, stevedore Luckenbach Steamship Company, as the foreman or "header" of a gang of longshoremen. Telfairs gang was assigned the duty of discharging cargo from the vessel's No. 4 cargo hold. As Telfair was descending the ladder from No. 4 upper 'tween deck to No. 4 lower 'tween deck he lost his footing when his foot slipped on one of the rungs of the ladder; both his feet slipped from the ladder rungs and his right knee struck some part of the ladder causing injuries which resulted ultimately in a surgical fusion of his knee.

Telfair brought suit against Zim Israel Navigation Company, Limited, the owner of the vessel, and Zim Israel Navigation Company impleaded Luckenbach

Steamship Company, the stevedore, seeking indemnification from Luckenbach for any amount Telfair might be entitled to recover from Zim Israel plus defense costs.

Telfair's case against Zim Israel Navigation Company was tried to a jury in March 1968 with trial of Zim Israel's indemnification case against Luckenbach deferred, at that time, with the consent of the parties and the concurrence of the Court. The jury found in favor of Zim Israel Navigation Company on teh negligence count of Telfair's complaint and against Zim Israel Navigation on Telfair's unseaworthiness count, and returned a verdict against the shipowner and in favor of Telfair in the amount of $133,385.00.

Thereafter, upon the motion of Zim Israel, a new trial was granted and in October 1968 Telfair's case against Zim Israel was again tried. As at the first trial, the jury found in favor of Zim Israel Navigation Company and against Telfair on Telfair's negligence count, and in favor of Telfair and against Zim Israel on Telfair's unseaworthiness count. The second trial resulted in a judgment in favor of Telfair and against Zim Israel in the amount of $50,000. Also at the October trial, the Third party Complaint of Zim Israel against Luckenbach was tried by the Court.

The case was tried on October 15, 16, 17, 18, 21 and 22, 1968, upon portions of six depositions and the testimony of some thirteen witnesses who appeared in person at the trial.

Having considered all of the evidence adduced at the trial, and after considering the memorandum arguments of counsel for Zim Israel and Luckenbach, the Court makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. On May 4, 1966, the M/V MAZAL was owned and operated by Zim Israel Navigation Company, Limited.

2. Telfair, the plaintiff, was employed on that date by Luckenbach Steamship Company as a longshoreman, assigned to work in the No. 4 hold of the MAZAL as the "header" or foreman of a gang of longshoremen employed by Luckenbach to discharge cargo.

3. Luckenbach Steamship Company was performing the stevedoring services on the MAZAL pursuant to an oral contract in accordance with a written rate schedule.

4. Telfair was injured shortly after 1:00 P.M. on May 4, 1966. After boarding about 1:00 P.M., he and his gang spotted the cargo boom for discharging, then went into the upper 'tween deck and moved certain hatch beams to clear the way for discharging and had started to go into the lower 'tween deck when the accident occurred. The accident resulting in his injuries occurred on the ladder at the forward end of No. 4 hold of the MAZAL between the upper 'tween deck and lower 'tween deck levels.

5. Telfair was the second man in his gang to descend the ladder upon which the accident occurred. The first man to use the ladder, longshoreman Robert Beam, also employed by Luckenbach, slipped but did not fall as he descended the ladder. After Beam slipped and before Telfair started down the ladder, Beam noted grease on his shoe. Befor Telfair slipped, Beam saw grease on the ladder. Beam did not warn of Telfair of the presence of grease on the ladder before Telfair slipped and fell.

6. Telfair, as well as Luckenbach's Pier Superintendent Melvin Cowles, testified that under the circumstances, Beam should have warned those coming

after him of the presence of grease on the ladder. The Court finds that Beam should have warned Telfair of the presence of grease on the ladder and that Beam's failure to give a warning was a failure on Beam's part to perform in a workmanlike manner.

7. Telfair was the employee of Luckenbach, who, on the day of the accident, was charged with the responsibility of making an inspection in the area in which his gang was to work and this responsibility included that of ascertaining that there was sufficient light in the work area and the places the longshoremen had to go through to get to the work aera, that the ladders were safe for use and whether there was anything out of order or wrong in connection with access routes to the working area. The Court finds that Telfair did not discharge this responsibility in a workmanlike manner in that, although it was "sort of dark" in the area in which the ladder was, Telfair did not request additional lighting of any kind. Telfair made no attempt to check visually the condition of the ladder before he started down, looking at it only to be sure that he did not step on Beam, the man who had gone down the ladder ahead of him.

8. There was testimony, and the Court finds, that the grease on the ladder was visible to one standing on the upper 'tween deck near the top of the ladder where Telfair was standing before he started to descend. Therefore the Court further finds that the ladder was visibly unsafe and that Luckenbach, the stevedore, had a duty to prohibit use of the ladder while it was in such a condition, under the Safety and Health Regulations for Longshoring.

9. Telfair testified that as he descended the ladder his gaze was directed upward. The Court finds that in failing to look where he was going, Telfair failed to use reasonable care for his safety. The Court accepts the testimony of Moshe Hami, who was the chief mate

of the MAZAL on the date of the accident, Pier Superintendent Cowles, and Luckenbach's Ship Stevedore Foreman Lucas, and finds that one in the exercise of reasonable care looks down when descending a ladder so as to see where he is going and what he is about to put his feet upon.

10. The Court finds that Longeshoreman George White, who was also employed by Luckenbach, was standing, with Telfair, at the head of the ladder as Beam went down, that White saw Beam when Beam slipped, but gave no warning to Telfair, who was to be the next man down the ladder, that Beam had slipped. The Court finds, as Telfair testified, that in keeping with good practice, George White should have warned Telfair and the other men about to use the ladder when he saw Beam slip.

11. Mr. Lucas, the Stevedore's ship foreman, and the person in Luckenbach's organization immediately above Telfair and the other headers in the chain of command, testified, and the Court finds, that there was no procedure at Luckenbach on the day of the accident whereby Mr. Lucas or anyone at his direction checked the ladders before the longshoremen were allowed to use them, and that there was not a procedure established by Luckenbach for checking the ladders for visible defects prior to use. The Court further finds that there was no inspection on behalf of Luckenbach, cursory or otherwise, of the ladder and the work area, before the longshoremen were sent into the hold to commence discharging. In view of the testimony of the longshoremen, particularly Elwood Favors, the Court finds that a cursory inspection would have disclosed the presence of grease on the ladder had such an inspection been made. The Court further finds that the failure to make a cursory inspection constituted a failure on the part of Luckenbach to perform stevedoring services in a workmanlike manner.

CONCLUSIONS OF LAW

1. This Court has jurisdiction over the subject matter of this action and of the parties.

2. Luckenbach Steamship Company breached its warranty of workmanlike service with respect to the stevedoring operations upon the MAZAL on the day on which Telfair was injured, in that Beam failed to off, after Beam had slipped in it and noticed it, before Telfair descended the ladder; in that Telfair himself warn Telfair of the grease on the ladder, or to clean it failed to exercise reasonable care for his own safety in directing his gaze upward as he descended the ladder and failing to look where he was going and see what there was to be seen; in that longshoreman George White failed to warn Telfair after he had seen Beam slip before Telfair started down the ladder; and in that Luckenbach did not cause even a cursory inspection of the ladder to be made before it was used by the longshoremen. The unseaworthiness of the MAZAL was brought into play by the breaches of warranty just mentioned.

3. Zim Israel Navigation Company, the ship owner, is entitled to be indemnified by Luckenbach Steamship Company, the stevedore, in the amount Telfair, the longshoreman plaintiff, recovers from Zim Israel Navigation Company plus attorneys' fees and the expenses of litigation in defending Telfair's suit. *Crumady v. The Joachim Hendric Fisser,* 358 U.S. 423, 428-429 (1959).

4. Defects which are observed cannot be overlooked. *Southern Stevedoring & Contracting Co. v Hellenic Lines, Ltd.,* 338 F.2d 267, 270-271 (5th Cir. 1968). The knowledge of Beam, a longshoreman employee of the stevedore, was notice to the stevedore. The actual knowledge need not be that of a supervisory employee. *T. Smith & Son, Inc. vs. Skibs A/S Hassel,* 362 F. 2d 745, 747 (5th Cir. 1966).

5. A stevedore has a duty to make a reasonable inspection of equipment supplied by a ship owner before using it. *Southern Stevedoring & Contracting Co. vs. Hellenic Lines, Ltd., supra.* The failure of Luckenbach to prohibit the use of the fixed ladder by its employees when it was visibly unsafe was a breach of Section 9.25 of the Safety and Health Regulations for Longshoring. Use of the ladder when it was visibly unsafe constituted a breach of the warranty of workmanlike service, c.f. *Ray vs. Compania Naviera Continental, S.A.*, 203 F. Supp 206, 210 (D. Md. 1962). The Safety and Health Regulations codify good industry practice. D/S *Ove Skou vs. Hebert,* 365 F.2d 341, 348 (5th Cir. 1966).

6. The negligence of Telfair himself, described above, also constituted a breach of the stevedore's warranty of workmanlike service. *United States Lines vs. Williams,* 365 F.2d 332 (5th Cir. 1966); *D/S Ove Skou vs. Hebert, supra,* at 350.

7. This is a case in which the stevedore was the party best situated to adopt preventive measures and reduce the likelihood of injury, by requiring a reasonable inspection prior to use of the ladder, and a case in which the principle enunciated in *Italia Societa vs. Oregon Stevedoring Company,* 376 U.S. 315 (1964) is applicable.

8. The stevedore may not assume that a safe condition exists when he has notice that such may not be the case. *Southern Stevedoring & Contracting Co. vs. Hellenic Lines, Ltd., supra,* at 271.

9. The defect in the ladder which produced Telfair's injuries, and which rendered the MAZAL unseaworthy as the jury has found, was not a latent one. It was simply grease on the ladder which was there to be seen and which was seen by a number of Luckenbach's employees. It should have been seen by Telfair had he but looked.

DONE and ORDERED at Tamp a, Florida, this 26th day of February, 1969.

JOSEPH P. LIEB
United States District Judge

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IN THE

Supreme Court of the United States

OCTOBER TERM — 1970

No. 854

LUCKENBACH STEAMSHIP COMPANY,
a corporation,
Petitioner,

vs.

ZIM ISRAEL NAVIGATION COMPANY, LIMITED,
and
HERMAN TELFAIR,
Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT, ZIM ISRAEL NAVIGATION COMPANY, LIMITED, IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI OF LUCKENBACH STEAMSHIP COMPANY

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit (Pet. App. 2-6)[1] is reported at 428 F.2d 127 (CA 5, 1970).

JURISDICTION

The opinion of the Fifth Circuit was entered on June 19, 1970, and a Petition for Rehearing addressed thereto was denied on July 22, 1970 (Pet.App. 1). Petitioner Luckenbach Steamship Company invokes jurisdiction pursuant to: (1) 28 USC 1254(1) (providing that Certiorari is a method by which this Court may review decisions of the Courts of Appeals), 28 USC

[1] "(Pet.App.)" refers to the Appendix to the Petition for a Writ of Certiorari filed in this case.

2201(c) (providing, inter alia, that a petition for Certiorari in a civil action must be filed within ninety days), and Supreme Court Rules 19(1)(a) and (b), 21 and 22(3).

Of the above-cited provisions only Supreme Court Rule 19 is related to the substantive jurisdiction of this Court. This respondent submits that the petitioner has demonstrated no basis for jurisdiction under Rule 19 criteria. The questions tendered by the petition are purely "episodic" and constitute nothing more than a request that this Court reconsider the evidence and analyze specific facts. Such an analysis would have no negotiable value outside the confines of this case and no relevance whatever to any body of federal law. Respondent submits that there are no "special and important" reasons for assuming jurisdiction under Rule 19.

QUESTION PRESENTED

Although the petitioner presents five questions to the Court, the shipowner respectfully submits that the petitioner's five questions are but variations upon a single theme and that the sole question properly before the Court is as follows:

> WHETHER, UNDER THE PARTICULAR CIRCUMSTANCES OF THE CASE, THE FIFTH CIRCUIT DECISION, HOLDING THE FINDINGS OF FACT BY THE TRIAL COURT WERE SUPPORTED BY COMPETENT EVIDENCE AND THUS NOT CLEARLY ERRONEOUS, IS WORTHY OF CERTIORARI.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner concedes that there are none involved (Petition, page 5) and we agree.

STATEMENT OF THE CASE

This Petition arises out of the shipowner's claim against the stevedore for indemnification in a longshoreman's personal injury suit. The longshoreman sued the shipowner in state court. The shipowner, after removing the case to federal court, brought the stevedore into the case as a third party defendant. The longshoreman's suit against the shipowner was tried to a jury. In the course of the first trial of the longshoreman's claim against the shipowner, the trial judge withdrew from the jury consideration of the issue of the contributory negligence of the longshoreman plaintiff. Subsequently, the Court granted the shipowner's motion for a new trial on the grounds that the issue of contributory negligence should have been submitted to the jury. The shipowner's claim against the stevedore for indemnification was deferred at the first trial pending the outcome of the longshoreman's claim against the shipowner.

At the second trial of the claim of the longshoreman against the shipowner, the shipowner's claim against the stevedore was also tried, but to the judge alone.

The trial judge found that the shipowner was entitled to be indemnified by the stevedore. The stevedore appealed from the judgment awarding indemnity to the shipowner.

The Court of Appeals affirmed the judgment of the District Court.

ARGUMENT

Under this heading we will set forth reasons for denying the writ in this cause.

Petitioner's stated basis for jurisdiction herein is Supreme Court Rule 19(1) (a) and (b). This respondent submits that no basis for jurisdiction has been demonstrated under that rule. The decisions of this Court clearly teach that Rule 19 certiorari jurisdiction (formerly Rule 38(5)) will not be used "to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227, 45 S. Ct. 496, 497 (1925). Further, to warrant Rule 19 attention the issues must be "beyond the academic or the episodic." *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 74, 75 S. Ct. 614, 616, 99 L.Ed. 897 (1955).

Luckenbach's contentions as to what conclusions are to be drawn from the evidence have been twice urged upon the trial court and briefed and argued to the Court of Appeals and, each time, rejected.

The stevedore's argument is really that the trial court, after hearing all the evidence (at two trials), found, as facts, (Pet. App. A-13-15) that:

(1) Beam, the first longshoreman down the ladder, slipped and saw grease on his shoe before Telfair, the plaintiff, started down the ladder and saw grease on the ladder before Telfair slipped, but did not warn Telfair of the presence of grease;

(2) under the circumstances Beam should have warned Telfair;

(3) Beam's failure to warn was a failure to perform in a workmanlike manner;

(4) Telfair did not discharge in a workmanlike manner his reponsibility to inspect the ladder his gang was to use;

(5) the grease on the ladder was visible to one standing where Telfair stood before he started down the ladder;

(6) Telfair failed to use reasonable care for his own safety in failing to look where he was going;

(7) White, another longshoreman who saw Beam slip, in keeping with good practice, should have warned Telfair and the others;

(8) the stevedore had no procedure for checking ladders for safety before longshoremen were allowed to use them;

(9) there was no inspection, cursory or otherwise, of the ladder in question made on behalf of the stevedore;

(10) Cursory inspection would have disclosed the grease; and

(11) the stevedore's failure to make a cursory inspection constituted a failure to perform stevedoring services in a workmanlike manner.

There was substantial evidentiary support for these findings of fact and the Court of Appeals, in affirming, properly rejected Luckenbach's invitation to weigh the evidence, evaluate the credibility of the witnesses, and reach conclusions different than those reached by the district court, which had seen and heard the witnesses in two trials. In brief, the Fifth Circuit held the district court's findings of fact passed muster under the "clearly erroneous" concept.

And there is no real question as to the legal sufficiency of these facts to support a judgment for indemnity for, as noted by the Fifth Circuit in its opinion at 438 F.2d 127, 129: "Luckenbach [the stevedore], in its brief, 'agrees that if Beam, the first longshoreman to descend the ladder, actually saw grease on the ladder and had sufficient time to warn Telfair, who was im-

ediately behind him, but failed to do so, there would be an adequate basis under applicable law to hold the stevedore liable for indemnity to the shipowner."

Whether grease was visible, what a cursory inspection would have disclosed, whether there was time to give warning, whether the plaintiff used reasonable care, what is "workmanlike performance" — these are "fact questions" in the purest sense.

This Court does not sit to evaluate the credibility of witnesses or to decide if a given defect was visible.

The impropriety of Luckenbach's request is clear. As stated by this Court in *Berenyi v. District Director, Imm & Nat. Serv.*, 385 U.S. 630, 639, 87 S. Ct. 666, 670, 17 L.Ed.2d 626 (1967):

> "In order to do so [reject as "clearly erroneous" the factual conclusion of the trial court and accepted by the Court of Appeals], we would be forced to disregard this Court's repeated pronouncements that it 'cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error.' E.g., Graver Tank & Mfg. Co. v. Linde Air Products Co., 336 U.S. 271, 275, 69 S.Ct. 535, 538, 93 L.Ed. 672. . . .
>
> The policy underlying the 'two-court' rule is obvious. This Court possesses no empirical expertise to set against the careful and reasonable conclusions of lower courts on purely factual issues. When, as here, resolution of the disputed factual issues turns largely on an assessment of the relative credibility of witnesses whose testimonial demeanor was observed only by the trial court, the rule has particular force. To be sure, this Court has not hesitated to undertake independent examination of factual issues when constitutional claims may depend on their resolution. See, e.g., Napue v. People of State

of Illinois, 390 U.S. 204, 271-272, 79 S. Ct. 1173, 1178-1179, 3 L.Ed.2d 1217; Fiske v. State of Kansas, 274 U.S. 380, 385-386, 47 S.Ct. 655, 656-657, 71 L.Ed. 1108. Cf. Hoffa v. United States, 385 U.S. 293, 87 S. Ct. 408, 17 L.Ed.2d 374. But this exceptional doctrine has no application to the present case, for the petitioner makes no claim that any constitutional issues are involved here."

Petitioner suggests a "conflict with Cia Maritima Del Nervion v. James J. Flanagan Ship. Corp., 308 F.2d 120 (CA 5, 1962); Ignatyuk v. Tramp Chartering Corp., 250 F.2d 198 (CA 2, 1957); Caldarola v. Cunard Steamship Company 270 F.2d 475 (CA 2, 1959), cert. denied 364 U.S. 884, 81 S.Ct. 172; Smith v. Joppedvanska Linie-joka Plovidba, 278 F.2d 178 (CA 4, 1960); Santomarco v. United States, 277 F.2d 255 (CA 2, 1960); and Ray v. Compania Naviera Continental, S.A., 203 F.Supp. 206 (D. Md. 1962).

In the Fifth Circuit petitioner strongly urged that *Flanagan* was the controlling case. The Fifth Circuit, through Judge Wisdom, the author of both the *Flanagan* opinion and the opinion presently under consideration, found no conflict with the principles set forth in *Flanagan*.

Cia. Maritima Del Nervion v. James L. Flanagan Ship Corp., 308 F.2d 120 (C.A. 5, 1962) arose out of an accident to the first longshoreman to go down a ladder under circumstances that indicated only a careful inspection or an actual descent of the ladder would disclose the defect and which evoked the conclusion that the stevedore did not have notice of the defect. The court noted that a cursory glance would not necessarily have revealed the defect. As the Court of Appeals observed in *D/S Ove Skou v. Hebert*, 365 F.2d 341 (C.A. 5, 1966) at 349:

"Flanagan states in a negative form what the law does not require *as a matter of law*. This leaves open for traditional assessment by the trier of fact the question of fact as to what constitutes WLP or breach of WWLP."

Ignatyuk v. Tramp Chartering Corp., 250 F.2d 198 (CA 2, 1957) involved a latent defect not an obvious, visible, observed one as was factually found to exist here.

Calderola v. Cunard Steamship Company, 279 F.2d 475 (CA2d 1960), cert. denied 364 U.S. 884, 81 S.Ct. 172, turned on the *factual* decision that the stevedore had neither knowledge nor constructive notice of the presence of greaze on a ladder. The Second Circuit simply held that, absent such knowledge or constructive notice, or a showing that the stevedore's employees created the dangerous condition, the trial court's finding of breach of warranty of workmanlike performance by the stevedore was "without foundation in the evidence and must be reversed."

Smith v. Jugosalvenska Linisjska Plovidea, 278 F.2d 176 (CA 4, 1960) and *Santomarco v. United States*, 277 F.2d 255 (CA 2, 1960) cited by petitioner as conflicting cases, in reality support the opinion of the trial court, in holding that if the stevedore has actual knowledge of an unsafe condition and fails to take remedial measures, it breaches the warranty of workmanlike performance. Here, the trial court found as a matter of fact based on competent evidence, that Luckenbach, through certain of its longshoremen employees, had actual knowledge of the "visibly unsafe" ladder and thus had a duty to prohibit use of the ladder while it was in such a condition. (Pet.App. 13, ¶6), (Pet.App. 14, ¶8).

Ray v. Compania Naviera Continental, S.A., 203 F.Supp. 206 (D.Md. 1962), a decision of a United States District Court in Maryland not sufficient to provide a conflict warranting assumption of jurisdiction, is factually distinguishable. In *Ray* indemnity was denied because the defect in the ladder was *latent and could not have been detected* by the stevedore by any kind of visual inspection as a practical matter. The Court stated at p. 210:

> "Obviously, were a ladder known to be unsafe or could it reasonably be ascertained that it was unsafe, a stevedoring company would be held to have breached its contractual warranty of workmanlike service if it failed to warn of possible danger and to prohibit the use of the unsafe ladder."

In summation, examination of all the cases cited as "conflicting" by petitioner makes it abundantly clear that if the stevedore had knowledge of the unsafe condition, and allowed activties to continue without taking remedial action, it breached its warranty of workmanlike performance owed to the shipowner. The different results in these cases flow from differing facts, not conflicting law.

In the case here under consideration the proper law was applied to the facts as found and the right result was reached.

The decision in the district court (and the affirmance by the Court of Appeals) imposes no new duty upon stevedores. It is simply an affirmation that a stevedore must perform in a workmanlike manner or bear the consequences.

CONCLUSION

For the foregoing reasons it is respectfully submitted that Luckenbach's Petition for a Writ of Certiorari should be denied.

DEWEY R. VILLAREAL, JR., ESQUIRE

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that three true copies of the foregoing Brief for Respondent Zim Israel Navigation Company, Limited, in Opposition to Petition for Writ of Certiorari have been mailed to McClain, Turbiville & Heller, 615 Marine Bank Building, Tampa, Florida; Macfarlane, Ferguson, Allison & Kelly, 512 North Florida Avenue, Tampa, Florida, and James O. Davis, Jr., of Brown, Dixon & Shear, 1810 Exchange National Bank Building, Tampa, Florida, Attorneys for Petitioner Luckenbach Steamship Co., and Wagner, Cunningham & Vaughan, 403 Morgan St., Tampa, Florida, and Walter H. Beckham, Jr. and Podhurst and Orseck, 2d Floor, Concord Bldg., 66 West Flagler Street, Miami, Florida, Attorneys for Respondent Herman Telfair, this 7th day of November, 1970.

DEWEY R. VILLAREAL, JR.